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July 13, 2004

Protect Constitutional Rights and Separation of Powers and Oppose Passage of H.R. 3313, the "Marriage Protection Act of 2003"

Dear Chairman Sensenbrenner and Ranking Member Conyers:

Americans United for Separation of Church and State urges you to oppose committee passage of H.R. 3313, the "Marriage Protection Act of 2003." Americans United represents more than 70,000 individual members throughout the fifty states and in the District of Columbia, as well as cooperating houses of worship and other religious bodies committed to the preservation of religious liberty. H.R. 3313 is an extreme, unwise, and unconstitutional proposal that would undermine the crucial separation of powers at the heart of our government, as well as thwart the independence of the federal courts.

H.R. 3313 would deprive all federal courts – including the U.S. Supreme Court – from their ability to hear constitutional challenges to the Defense of Marriage Act. Americans United firmly believes that the text, history and structure of the Constitution, together with important policy considerations, should lead the Committee and the House of Representatives to soundly defeat this dangerous and misguided bill, as well as any other court-stripping proposal.

The Marriage Protection Act is Unconstitutional

Article III, Section 1 of the United States Constitution creates the Supreme Court and provides the Congress with the power to establish "such inferior Courts as the Congress may from time to time establish." Section 2 of Article III delineates sets of cases that the federal courts may hear, provides for areas of original jurisdiction of the U.S. Supreme Court, and also provides for the appellate jurisdiction of the Supreme Court in other areas "with such Exceptions, and under such Regulations as the Congress shall make."

Under Section 2, Congress may have limited authority to limit the types of cases over which the Supreme Court may exercise its appellate jurisdiction. Although the extent of this authority is in dispute and has been the subject of academic commentary over the years, there are clear limits to the authority of Congress to limit the jurisdiction of the federal courts based on other applicable provisions of the Constitution. The Marriage Protection Act would do just that, in that it would not only impose restrictions on a particular subject, but would entirely deprive every federal court – including the U.S. Supreme Court – from hearing any constitutional challenge to the Defense of Marriage Act, in violation of equal protection, due process, and separation of powers principles.

The Marriage Protection Act Deprives Gays and Lesbians of their Access to Federal Courts, Thereby Unconstitutionally Depriving a Discrete Minority of Basic Access to Government

The Marriage Protection Act is clearly unconstitutional because it violates equal protection guarantees for a discrete minority group, namely gay and lesbian Americans. By withdrawing federal jurisdiction over challenges to DOMA, the Act would totally deprive this particular minority group – and only this minority group — of its ability to seek governmental protection of constitutional rights in federal courts. As the Supreme Court stated in Romer v. Evans, 517 U.S. 620 (1996), "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Id. at 633. Moreover, like Colorado's Amendment 2 at issue in Romer, the Marriage Protection Act is unconstitutional because of its "peculiar property of imposing a broad and undifferentiated disability on a single named group." Id. at 632. By shutting gay and lesbian Americans out of the federal courts to challenge a federal Act that specifically targets them, there can be no doubt that the Marriage Protection Act is unconstitutional under Romer.

The Marriage Protection Act Would Violate Due Process Rights and Undermine the Separation of Powers

Basic due process demands an independent judicial forum capable of determining federal constitutional rights. Congress' complete denial of a federal forum to plaintiffs in a specified class of cases would force plaintiffs out of federal courts, which are specially suited for the vindication of federal interests, and into state courts, which may be hostile or unsympathetic to federal claims, and which may lack expertise and independent safeguards provided to federal judges under Article III of the Constitution. In apparent recognition of this fact, no federal bill withdrawing all federal jurisdiction with respect to a particular substantive area has become law in decades.

The Marriage Protection Act also would violate the separation of powers. Under Marbury v. Madison, the Supreme Court has the inherent power to say what the law is—to "decide . . . [cases] conformably to the law, [including] the Constitution . . . This is of the very essence of judicial duty." Laurence H. Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 Harv. Civ. Rights – Civ. Liberties Law Rev. 129, 136 (1981) (quoting Marbury v. Madison, 5 U.S. 137, 178 (1803)). Congress cannot and should not make 'exceptions' to Supreme Court jurisdiction, which would intrude upon the core functions of the Supreme Court and the inferior federal courts as an equal branch in our system of separation of powers. By usurping the federal judicial function, and by doing so before any federal court has had the opportunity to review a challenge to DOMA, the Marriage Protection Act seriously compromises the independence of the judiciary so crucial to the system of separation of powers. By excluding all federal jurisdiction with respect to certain claims, the Marriage Protection Act undermines the Court's essential functions — namely, to maintain the supremacy and uniformity of federal law across the United States. Moreover, the Marriage Protection Act could cause significant disarray on questions surrounding the constitutionality of DOMA, as federal claims on this issue would be decided by the supreme courts in each of the fifty states, thereby allowing for the possibility of varied and conflicting interpretations of DOMA, and no final review by the nation's highest court.

Political frustration with controversial court decisions during the second half of the twentieth century provoked Congress to propose a number of court-stripping measures designed to overturn court decisions touching on a wide variety of issues, including: anti-subversive statutes, apportionment in state legislatures, "Miranda" warnings, busing, school prayer, abortion, racial integration, and composition of the armed services. All of these measures failed to pass Congress. In each instance, bipartisan concerns over threats to the American system of government and constitutional order gave way to a recognition of these court-stripping measures for what they truly were: attempts to circumvent the careful process required for amendments to the U.S. Constitution. As Professor Michael J. Gerhardt stated in his testimony regarding the Marriage Protection Act before the Constitution Subcommittee on June 24, 2004: "Efforts, taken in response to or retaliation against judicial decisions, to withdraw all federal jurisdiction or even jurisdiction of inferior federal courts on questions of constitutional law are transparent attempts to influence, or displace, substantive judicial outcomes. For several decades, the Congress, for good reason, has refrained from enacting such laws." Like so many failed court-stripping measures that have come before it, the Marriage Protection Act represents yet another illegitimate short cut to amending the Constitution, is against the weight of history, and must fail.

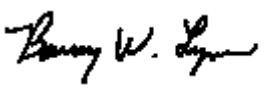
The Marriage Protection Act is Extreme, Unwise, and Represents Misguided Policy

In addition to its unconstitutionality, the Marriage Protection Act fundamentally represents extreme and misguided policy. The Act would fundamentally undermine public confidence in a fair and independent federal judiciary by expressing outright hostility to it, and by attempting to manipulate the federal judiciary's power to remedy violations of individuals' constitutional rights. The Act also is tremendously destructive in that it suggests that Congress could -- and should -- restrict the jurisdiction of federal courts whenever a majority of Congress backs a particular position on a controversial issue – especially one involving the legal rights of a minority group. Just as Congress has refused to pass numerous bills in recent years to force restrictions on the federal courts' ability to hear cases on issues such as school prayer and reproductive choice, so it should do so here as well.

The Marriage Protection Act is unconstitutional and represents an attack on our very system of government. Americans United strongly urges you to leave the independence of the federal judiciary in tact, respect separation of powers principles underlying our form of government, and reject this misguided bill.

If you have any questions regarding this legislation or would like further information on any other issues of importance to Americans United, please do not hesitate to contact Aaron D. Schuham, Legislative Director, at (202) 466-3234, extension 240.

Sincerely,



Rev. Barry W. Lynn
Executive Director

cc: Members of the House Committee on the Judiciary